October Term, 1980

Docket No. 80-1951

Office-Supreme Court, U.S.
FILED
JUN 20 1981
ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

THEODORE B. MOORE,

Petitioner

against:

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, consisting of Leo Cardenas, Francis H. Salter, and Alfred Wood; CHARLES BROWN, F. SAM MACDONALD, JOSEPH PETTIT, J. DOUGLAS McCLUSKIE, JOHN A. SBARBARO, and THE CITY AND COUNTY OF DENVER, a municipal corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

BRIEF IN OPPOSITION ON BEHALF OF ALL RESPONDENTS

Max P. Zall
City Attorney
Geoffrey S. Wasson
Assistant City Attorney
1445 Cleveland Place, Room 303
Denver, Colorado 80202
(303) 575-2931
Counsel of Record for Respondents

QUESTIONS PRESENTED FOR REVIEW

1. Did the Petitioner raise the Federal questions for which he seeks review in a timely manner in the trial court and the Colorado Court of Appeals?

2. Can the Petitioner create a constitutional question that arises out of a trial court that the Petitioner asked the trial court to enter?

TABLE OF CONTENTS

Page

Questions Presented For Review i
Statement of the Case 1
Argument 7
Conclusion 12
Appendix A-1

TABLE OF AUTHORITIES

Page

Cases:

Bailey v. Anderson, 326 U.S. 203 (1945) 9,10

Bigler v. Bigler, 82 Colo 463, 260 P. 1081 (1927) 11

Boyd v. Adjustment Bureau, Inc., 148 Colo 233, 365 P.2d 813 (1961) 9

Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) 8

Donovan v. Penn Shipping Co., Inc. 429 U.S. 648, 650 (1977) 12

Hessling v. Broomfield, 193 Colo 124, 563 P.2d 12 (1977) 9

Lassner v. Civil Service Commission, 177 Colo 257, 493 P.2d 1087 (1972) 1

Manka v. Martin, ____Colo____, 614 P.2d 875, 877 (1980) 9

New York ex. rel. Bryant v. Zimmerman,
278 U.S. 63 (1928) 8

Petrafeck v. Industrial Commission,
191 Colo 566, 554
P.2d 1097 (1976) 6

State Civil Service Commission
v. Hazlett, 119 Colo 173, 201
P.2d 616 (1948) 1

Street v. New York, 394 U.S.
675 (1969) 8

STATUTES

28 U.S.C. §1257 7

COLORADO RULES OF CIVIL PROCEDURE

106(a) 1
106(a)(4) 1, 5
59(f) 8

STATEMENT OF THE CASE

The Respondents believe Petitioner's statement is, in certain respects, inadequate and incomplete and therefore supplies this supplemental statement.

This case arose when the Petitioner sought judicial review of a decision entered by a quasi-judicial tribunal (the Career Service Board of the City and County of Denver) pursuant to Rule 106(a)(4) of the Colorado Rules of Civil Procedure. In addition, the Petitioner alleged three other causes of action for damages premised upon three tort theories.

The Petitioner demanded trial to a jury on all matters "except those contained in his First Cause of Action which pertain solely to a review under Rule 106(a) of the C.R.C.P." That First Cause of Action was determined by the trial court after the record of the proceedings below was certified and the Petitioner and Respondents had submitted briefs. In the trial court, the Petitioner asserted that the appropriate standard of review was "that agency action should be set aside if the action is unsupported by substantial evidence when the record is considered as a whole." (Appendix F, p.28). Petitioner relied upon *Lassner v. Civil Service Commission*, 177 Colo. 257, 493 P.2d 1087 (1972).

The Respondents asserted that the proper standard of review was that which was stated in *State Civil Service Commission v. Hazlett*, 119 Colo. 173, 201 P.2d 616, 619 (1948), wherein the Colorado Supreme Court held:

> The scope of review in certiorari proceedings, and the authority of courts to interfere with the findings of tribunals vested with exclusive

> jurisdiction to determine particular issues, have, by a long line of decisions, been judicially defined. We cannot consider herein whether the Commission's findings are right or wrong, substitute our judgment for that of the Commission's findings if there is any competent evidence to support the same . . ."

The trial court utilized the standard of review as argued by Respondents and sustained the findings of the Career Service Board. Upon that action by the trial court, the Petitioner moved the trial court to enter judgment in favor of the Respondents on all of the Petitioner's claims (Appendix A, *infra*). The Respondents did not oppose the motion and stipulated to the entry of final judgment in favor of the Respondents on all the claims as requested by the Petitioner (Appendix B, *infra*). The trial court granted the Petitioner's Motion and final judgment was entered on all the claims.

The Petitioner then filed a Motion for Rehearing and New Trial (Appendix C, *infra*). The Petitioner alleged the following grounds in support of the Motion:

1. The Court erred in affirming the action of the Career Service Board suspending the plaintiff without pay for five days, despite substantial and unrebutted evidence that the suspension was unjustified.

2. The Court erred in affirming the action of the Career Service Board denying the plaintiff's grievances relating to unjustified harassment from his supervisors, as indicated by the letter from the defendant McCluskie dated September 8, 1976, in the suspension of plaintiff without pay for five days, in the bumping of

plaintiff by the defendant MacDonald on September 28, 1976, in the denial of plaintiff's proficiency pay increase on October 1, 1976, and in the verbal abuse of plaintiff stemming from the inspection of the residence at 2832 Elm Street.

3. The Court erred in failing to rule that the defendant Board failed to make a sufficient finding of fact as to whether John Sbarbaro, Director of Public Health and Preventive Medicine, acted to deny plaintiff's grievance concerning 2832 Elm Street within 7 days, as required by Rule 11-30 of the Personnel Rules of the Career Service Authority. Appendix C at p. 9 and 10.

The Motion For Rehearing and New Trial was denied by the trial court. The Petitioner then perfected an appeal to the Colorado Court of Appeals. Under Colorado Appellate Rule 10.1, the Petitioner was ordered by the Court of Appeals to file a Preliminary Statement (Appendix D, *infra*) to assist the Court of Appeals in determining if the appeal should be accelerated. The Petitioner was ordered to state the issues proposed to be raised on appeal. The Petitioner stated those issues as follows:

1. Did the District Court err in affirming the action of the Career Service Board suspending the Plaintiff without pay for five days, despite substantial and unrebutted evidence that the suspension was unjustified?

2. Did the District Court err in affirming the action of the Career Service Board denying the Plaintiff's grievances relating to

unjustified harassment from his supervisors?

3. Did the District Court err in failing to rule that the Board failed to make a sufficient finding of fact as to whether the Defendant Sbarbaro acted to deny a grievance of Plaintiff within 7 days, as required by Rule 11-30 of the Personnel Rules of the Career Service Authority? Appendix D at p. 15.

The Court of Appeals reviewed the Petitioner's Preliminary Statement and an order was entered accelerating the appeal (Appendix E, *infra*). The Petitioner and Respondents were each given the option of relying upon any briefs filed with the trial court or filing new briefs. The Petitioner elected to rely on the trial court brief with a short supplement (Appendix F, *infra*); the Respondents filed a new brief (Appendix G, *infra*); and the Petitioner elected not to file a reply brief that was permitted in the accelerated appeal order.

After a decision adverse to the Petitioner, a Petition for Rehearing (Appendix H, *infra*) was filed in the Court of Appeals wherein Petitioner stated in pertinent part:

> The standard of review in this matter should have been whether there was substantial evidence to support the Career Service Board's action, rather than the "any competent evidence" standard applied by the District Court and the Court of Appeals. There is no rational basis for a state employee to have his case reviewed under the substantial evidence standard, while a county or municipal employee to

be saddled with the "any competent evidence" standard. Application of the lesser standard in this case to Moore denies him his rights of due process and equal protection. Appendix H at p. 62.

The Petition For Rehearing was denied and Certiorari from the Colorado Court of Appeals was perfected to the Colorado Supreme Court (Appendix I, *infra*). The Petitioner stated the questions presented for review as follows.

1. Should the proper scope of review under C.R.C.P. 106(a)(4) of the Career Service Board's findings be whether there was any competent evidence to support the findings, or whether the findings are supported by substantial evidence?

2. Was the District Court correct in affirming the action of the Career Service Board suspending Petitioner without pay for five days, despite substantial and unrebutted evidence that the suspension was unjustified?

3. Was the District Court correct in affirming the action of the Career Service Board denying Petitioner's grievances relating to unjustified harassment from his supervisors? Appendix I at p. 66.

The argument by Petitioner in the Colorado Supreme Court was that:

> There is no rational reason why a municipal employee such as Moore (the Petitioner) should be given only the "any competent evidence" review by the appellate courts of this

> state, while a state employee should be entitled to the "substantial evidence" standard. This Court has indicated that "the constitutional minimum under the Equal Protection Clause is that a distinction between ostensibly similar classes must be rationally related to a legitimate state objective." *Petrafeck v. Industrial Commission,* 191 Colo 566, 568, 554 P.2d 1097 (1976). There do not appear to be any real differences between the situation of a municipal and state employee. Appendix I at p. 69.

The Respondents filed a Brief in Opposition to Petition for Writ of Certiorari (Appendix J, *infra*) wherein the Respondents maintained that the equal protection argument had not been timely raised as an issue in the proceedings below. The Respondents argued that this failure to raise the issue stood as a barrier to it being raised before the Colorado Supreme Court (Appendix J at p. 76).

The Petition before the Colorado Supreme Court was denied and the Petition now under review was timely filed.

SUMMARY OF ARGUMENT

1. The Petitioner failed to raise the Federal questions in a timely manner before the trial court and the Colorado Court of Appeals. With the Petitioner having failed to timely raise the Federal questions, this Court lacks jurisdiction to grant the Petition for Writ of Certiorari.

2. The Petitioner is estopped from asserting a constitutional error that arises from an order the Petitioner asked the trial court to enter.

ARGUMENT

1. THE PETITIONER FAILED TO RAISE THE FEDERAL QUESTIONS IN A TIMELY MANNER BEFORE THE TRIAL COURT AND THE COLORADO COURT OF APPEALS. WITH THE PETITIONER HAVING FAILED TO TIMELY RAISE THE FEDERAL QUESTIONS, THIS COURT LACKS JURISDICTION TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

Title 28 U.S.C. §1257 provides in pertinent part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Title 28 U.S.C. §1257 has been held to be a limitation imposed by Congress on this Court's authority to review judgments of state courts. It has been held to be a jurisdictional limitation as this Court stated in *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969):

> Upon like grounds . . . the jurisdiction of this Court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right. *Oxley Stove Co. v. Butler County*, 166 U.S. 648 (1897).

In *Street v. New York*, 394 U.S. 675 (1969) this Court reaffirmed the principle stated in *New York ex. rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) where it was held:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.

Rule 59(f) of the Colorado Rules of Civil Procedure provides that:

> The party claiming error in the trial of any case (except as provided in section (h) of this Rule) must move the trial court for a new trial as herein above provided, and the trial court may not dispense with the necessity for filing such a motion but may dispense with oral argument on the motion after it is filed, and only questions presented in such motion will be considered by the appellate court on review; provided, however, that if a motion to alter or amend the judgment is filed it shall, for appellate purpose, be considered as a motion for a new trial.

The Colorado Supreme Court has held that under this rule a motion for new trial must be filed as a prerequisite to the right of a party to seek appellate review. The rule applies in cases where a review of a pure question of law is sought, as well as for a review of questions of facts, *Boyd v. Adjustment Bureau, Inc.*, 148 Colo 233, 365 P.2d 813 (1961).

The Colorado Supreme Court has consistently held that where constitutional issues were not raised before the district court, they would not be considered on appeal, see *Hessling v. Broomfield*, 193 Colo 124, 563 P.2d 12(1977), and *Manka v. Martin*, ____Colo____, 614 P.2d 875, 877 (1980) wherein the Colorado Supreme Court held:

> Questioning the constitutionality of a statute for the first time in an appellate brief will not successfully raise the issue for review by this Court on appeal.

The development of this case clearly shows that the Petitioner objected to the utilization of the "any competent evidence standard of judicial review." However, it was not until after the adverse decision in the Court of Appeals that the Petitioner stated in his Petition for Rehearing (Appendix H) that his objection was constitutionally grounded. In *Bailey v. Anderson*, 326 U.S. 203 (1945), the Petitioner argued that a state court condemnation award denied him just compensation in violation of the Due Process Clause of the Fourteenth Amendment because the award failed to include interest from the date of possession. This Court found that:

> Appellant's petition in the circuit court asked that the award include interest from the date

> of the taking . . . But throughout the proceedings in the circuit court, appellant made no claim to interest on constitutional grounds, and made no attack on the constitutionality of the award or the court's decree because of the asserted denial of interest. *Id.* at 206.

The appeal was then dismissed for the lack of any properly presented substantial Federal question. The Petitioner here has committed the same error as the Petitioner in *Bailey, supra.* The Petitioner did not timely state that his objection to the standard of review was premised upon constitutional grounds. The failure to timely raise the constitutional issue dictates a denial of the Petition of Certiorari for the lack of any properly presented substantial Federal questions.

2. THE PETITIONER IS ESTOPPED FROM ASSERTING A CONSTITUTIONAL ERROR THAT ARISES FROM AN ORDER THE PETITIONER ASKED THE TRIAL COURT TO ENTER.

The Petitioner states the second question presented for review as follows:

> 2. Does the effect of an administrative board's decision which effectively bars the defendant from a suit for damages in a state court effectively deny his rights to due process and equal protection under the Fifth and Fourteenth Amendments to the U.S. Constitution?

This issue suffers from the defects stated in Argument One above; it was not raised in the trial court, the

Court of Appeals, or even in the Petition for Certiorari from the Colorado Court of Appeals that was filed in the Colorado Supreme Court.

The Petitioner now states for the first time at Page 10 of his Petition that:

> . . . [t]he foreclosing of Moore's (Petitioner) pursuing a suit for damages on account of the adverse administrative ruling disregards his rights to due process and equal protection.

The Respondents do not dispute or deny that the trial court did enter final judgment on all the claims. The Petitioner neglects to state, however, that the trial court was acting in response to a Motion to Revise Order submitted by the Petitioner (Appendix A at p. 1) and a Stipulation for Entry of Final Judgment and Order (Appendix B at p. 5) signed by counsel for both the Petitioner and the Respondents. The entry of judgment on the Petitioner's suit for damages was simply not the result of an adverse ruling by the trial court. The Colorado Supreme Court in *Bigler v. Bigler,* 82 Colo. 463, 260 P. 1081 (1927) held that a legatee after consenting to the probate and recording of a will in the county court could not then contest it on appeal to the district court stating:

> Plaintiff in error could not consent to the probate and recording of the will in the county court, and later appear in the district court *and have the work of his own hand set aside* (emphasis added) *Id.* at 1082.

The Petitioner seeks no less here when he attempts to raise a constitutional issue which is grounded upon an order of the trial court which the Petitioner had sought and requested in the first instance.

This Court has held in *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 650 (1977)

> [t]hat a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted.

By comparison, the Petitioner here did more than just accept the order of the trial court entering judgment on the Petitioner's damage claims, the Petitioner asked the trial court to enter that order. The Petitioner cannot logically expect a right to appeal a judgment that he sought.

CONCLUSION

The Respondents respectfully submit that the Petitioner should be estopped from asserting a constitutional error that allegedly arises from an order the Petitioner asked the trial court to enter.

The Petitioner failed to timely state that his objections to the standard of judicial review argued by the Respondents and utilized by the Colorado Court of Appeals were based upon constitutional grounds. The Petitioner never raised the second issue in his Petition

before any of the Colorado courts. These failures are jurisdictional defects that cannot be cured. The jurisdictional defect of not timely presenting the Federal questions to the Colorado courts dictates that the Writ for Certiorari should be denied.

Respectfully Submitted,

MAX P. ZALL
City Attorney

GEOFFREY S. WASSON
Assistant City Attorney

1445 Cleveland Place, Room 303
Denver, CO 80202
Telephone: (303) 575-2931

Appendix A

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Civil Action No. 79CV0564, Courtroom 8

THEODORE B. MOORE,

Plaintiff,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, et al.

Defendants.

MOTION TO REVISE ORDER

COMES NOW the plaintiff, Theodore B. Moore, by and through his attorney, Bradley J. Yoder, pursuant to Colo. R. Civ. P. 54(b) and respectfully moves the Court to revise its Order entered August 15, 1979 affirming the ruling of the Career Service Board. The plaintiff requests that the order be revised to indicate the entry of a final judgment in this action.

As grounds for his motion, plaintiff shows the Court the following:

1. Colo. R. Civ. P. 54(b) provides:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties

> are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims, or parties and the other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

2. The large preponderance of the factual basis for plaintiff's causes of action for damages in this matter was ruled upon by the Career Service Board.

3. Unless the Board's action is reversed, there would be few matters left upon which to proceed to trial before this honorable court.

4. At the hearing on plaintiff's Colo. R. Civ. P. 106 motion, counsel for both sides agreed that if the Board's action were affirmed, there would be no reason why a final judgment should not be entered.

5. The Court has affirmed the ruling of the Board, but did not designate its affirmance as a final judgment.

6. There is no just reason for delaying the entry of a final judgment in this matter.

WHEREFORE, the plaintiff respectfully requests that the Court's Order of August 15, 1979 affirming the ruling of the Career Service Board be revised under Colo. R. Civ. P. 54(b) to indicate that the affirmance is a final judgment.

Respectfully submitted,

/s/ _____

Bradley J. Yoder (#8549)
Attorney for Plaintiff
P.O. Box 207, 317 Third St.
Castle Rock, CO 80104
688-4815

Appendix B

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Civil Action No. 79CV0564, Courtroom 8

THEODORE B. MOORE,

Plaintiff,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, et al.,

Defendants.

STIPULATION FOR ENTRY OF FINAL JUDGMENT, AND ORDER

COME NOW all the parties, by and through their respective attorneys, and hereby stipulate and agree as follows:

1. The defendants confess plaintiff's Motion to Revise Order, which motion was set for hearing on November 14, 1979.

2. Due to the fact that the large preponderance of the factual allegations in plaintiff's Complaint in this matter were ruled upon by the Career Service Board, and the Board's ruling has been affirmed by the Court, there is no just reason for delaying the entry of a final judgment in this matter.

3. Entry of a final judgment at this point on all the matters in this action is proper under Colo. R. Civ. P. 54(b).

WHEREFORE, the parties respectfully request that the Court revise its order of August 15, 1979 affirming the ruling of the Career Service Board to indicate under Colo. R. Civ. P. 54(b) that the affirmance is a final judgment. The proposed Order following this Stipulation is approved as to form by the parties.

Respectfully submitted,

/s/ _____

Bradley J. Yoder (#8549)
Attorney for Plaintiff
P.O. Box 207, 317 Third St.
Castle Rock, CO 80104
688-4815

MAX P. ZALL, City Attorney
#2367

ROBERT D. DOWLER #1926 and
GEOFFREY S. WASSON #6103
Assistant City Attorneys

By _____
Attorneys for Defendants
353 City & County Bldg.
Denver, CO 80202
575-2931

ORDER

THE MATTER of plaintiff's Motion to Revise Order and the parties' Stipulation for Entry of Final Judgment having come before the Court, and the Court having reviewed said Motion and Stipulation,

DOTH FIND AND ORDER:

1. There is no just reason for delay of the entry of a final judgment on all claims in the above-captioned matter.

2. In accordance with the Court's minute order of August 15, 1979 affirming the findings of the Career Service Board, the Court hereby enters final judgment under Colo. R. Civ. P. 54(b) on all claims in the above-captioned matter.

DONE AND DATED this 4 day of December, 1979.

BY THE COURT:

/s/ John E. Brooks
District Judge

Appendix C

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Civil Action No. 79CV0564, Ctrm. 8

THEODORE B. MOORE

Plaintiff,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, et al.,

Defendants

MOTION FOR REHEARING AND NEW TRIAL

COMES NOW the plaintiff, Theodore B. Moore, by and through his attorney, Bradley J. Yoder, and respectfully moves the Court for a rehearing and a new trial in the above matter.

As grounds for his motion, plaintiff shows the Court the following:

1. The Court erred in affirming the action of the Career Service Board suspending the plaintiff without pay for five days, despite substantial and unrebutted evidence that the suspension was unjustified.

2. The Court erred in affirming the action of the Career Service Board denying the plaintiff's grievances relating to unjustified harassment from his supervisors, as indicated by the letter from the defendant

McCluskie dated September 8, 1976, in the suspension of plaintiff without pay for five days, in the bumping of plaintiff by the defendant MacDonald on September 28, 1976, in the denial of plaintiff's proficiency pay increase on October 1, 1976, and in the verbal abuse of plaintiff stemming from the inspection of the residence at 2832 Elm Street.

3. The Court erred in failing to rule that the defendant Board failed to make a sufficient finding of fact as to whether John Sbarbaro, Director of Public Health and Preventive Medicine, acted to deny plaintiff's grievance concerning 2832 Elm Street within 7 days, as required by Rule 11-30 of the personnel rules of the Career Service Authority

WHEREFORE, plaintiff respectfully requests that the Court grant a rehearing in the above matter and also grant plaintiff a new trial.

Respectfully submitted,

/s/ _____

Bradley J. Yoder (#8549)
Attorney for Plaintiff
P.O. Box 207, 317 Third St.
Castle Rock, CO 80104
688-4815

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Civil Action No. 79CV0564, Ctrm. 8

THEODORE B. MOORE,

Plaintiff,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, et al.,

Defendant.

MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR REHEARING AND NEW TRIAL

COMES NOW the plaintiff, Theodore B. Moore, by and through his attorney, Bradley J. Yoder, and respectfully submits the following memorandum brief in support of plaintiff's Motion for Rehearing and New Trial.

In *Lassner v. Civil Service Commission*, 177 Colo. 257, 493 P.2d 1087 (1972), the appellant Lassner's dismissal as chief psychologist from the Colorado State Hospital was affirmed by the Civil Service Commission and the District Court. In reversing the dismissal, the Colorado Supreme Court stated that agency action should be set aside if the action is unsupported by substantial evidence when the record is considered as a whole. 177 Colo. at 259. The Court also stated:

> If there is only some evidence in some particulars, if is insufficient to justify affirmance of the discharge of a civil service employee. *** After

> a thorough review of the record, we are convinced that appellant's dismissal cannot stand. Without detailing the testimony, it is obvious that the evidence on the specific charges was technical and trivial and is not supportive of substantial cause on the whole record. On the other hand the record reveals a personality conflict existed between appellant on one side, and his superior and a few co-workers of equal status on the other. ***

As the evidence presented by plaintiff was substantial and unrebutted that his suspension was unjustified and that his grievances were meritorious, the action of the Career Service Board should not have been allowed to stand.

The records and findings of an administrative board must disclose the basis of conclusions reached by them and be supported by the evidence. *Linder v. Copeland*, 137 Colo. 53, 320 P.2d 972 (1958). There was no finding by the Board in the present case as to whether the grievance relating to 2832 Elm St. was timely ruled upon.

Respectfully submitted,

/s/ _____

Bradley J. Yoder (#8549)
Attorney for Plaintiff
P.O. Box 207, 317 Third St.
Castle Rock, CO 80104
688-4815

Appendix D

COLORADO COURT OF APPEALS

No._____

THEODORE B. MOORE,
Plaintiff-Appellant,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, et al.,
Defendants-Appellees.

APPELLANT'S PRELIMINARY STATEMENT

TRIAL COURT HISTORY

COURT: District

COUNTY: Denver

DATE OF JUDGMENT OR ORDER: Entry of Final Judgment - December 4, 1979; Motion for New Trial denied - February 7, 1980

TRIAL COURT NO.: 79CV0564, Courtroom 8

JUDGE: Honorable John Brooks, Jr.

DATE NOTICE OF APPEAL FILED: March 4, 1980

NAME OF COUNSEL

Attorney for Plaintiff-Appellant: Bradley J. Yoder, P.O. Box 207, 317 Third Street, Castle Rock, CO 80104, 688-4815, Registration No. 8549.

Attorneys for Defendants-Appellees: Max P. Zall, Reg. No. 2367, City Attorney, Geoffrey S. Wasson, Reg. No. 6103, Assistant City Attorney, 353 City and County Building, Denver, CO 80202, 575-2931.

DISPOSITION IN TRIAL COURT

Judgment entered affirming action of Career Service Board suspending plaintiff without pay for five days and denying plaintiff's grievances.

Relief requested: Finding that Career Service Board acted in arbitrary and capricious manner, exceeded jurisdiction, and abused discretion in its Findings and Order, and $450,000 in damages against defendants.

Relief granted: None.

NATURE OF CASE

Plaintiff was suspended without pay for five days from September 20 through 24, 1976 as a housing inspector with the defendant City, for his failure to sign an inspection notice which he considered inaccurate and illegal. Plaintiff appealed the suspension and submitted other grievances regarding unjustified harassment by supervisors to the Career Service Board. The Board upheld the suspension and denied plaintiff's grievances.

Plaintiff appealed the action of the Board to the District Court, and commenced an action for damages in the District Court.

ISSUES PROPOSED TO BE RAISED ON APPEAL

1. Did the District Court err in affirming the action of the Career Service Board suspending the plaintiff without pay for five days, despite substantial and unrebutted evidence that the suspension was unjustified?

2. Did the District Court err in affirming the action of the Career Service Board denying the plaintiff's grievances relating to unjustified harassment from his supervisors?

3. Did the District Court err in failing to rule that the Board failed to make a sufficient finding of fact as to whether the defendant Sbarbaro acted to deny a grievance of plaintiff within 7 days, as required by Rule 11-30 of the personnel rules of the Career Service Authority?

RECORD ON APPEAL

The record on appeal should include items 1, 3, 5, 6, and 7 from the abbreviated record. In addition, the record should include the following documents:

1. Brief of Plaintiff in Support of Action under Colo. R. Civ. P. 106(a).

STATEMENT OF POSITION RE: TRANSCRIPT

The transcript of the proceedings before the Career Service Board was prepared and reviewed by

the District Court. That transcript should be available to the Court of Appeals. However, no transcript of the proceedings before the District Court should be required to resolve the issues raised on appeal.

Dated this 18th day of March, 1980.

/s/ _____

Bradley J. Yoder (#8549)
Attorney for Plaintiff-Appellant
P.O. Box 207, 317 Third St.
Castle Rock, CO 80104
688-4815

Appendix E

COLORADO COURT OF APPEALS

No. 80CA0247

THEODORE B. MOORE
Plaintiff-Appellant,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, et. al.,
Defendants-Apellees.

ORDER ACCELERATING APPEAL, DIRECTING PREPARATION OF THE RECORD, AND ESTABLISHING A BRIEFING SCHEDULE

(Trial Court No. 79CV0564)

Having reviewed the jurisdictional information filed with this court, and the preliminary statement(s) of the appellant, it appears therefrom that this court has jurisdiction of this appeal and that this appeal should be accelerated.

IT IS THEREFORE ORDERED:

1. Appellant(s) may elect to rely upon any briefs filed with the trial court relative to the issues raised in this appeal, or file a new brief. In either case, four copies of the trial court briefs or appellate briefs submitted by appellant(s) should be mailed or delivered to the clerk of this court on or before April 21, 1980. A copy of the brief(s) shall be served on the appellee(s) pursuant to C.A.R. 25(c).

2. Appellee(s) may elect to rely upon any briefs filed with the trial court relative to the issues raised in this appeal, or file a new brief. In either case, four copies of the trial court briefs or appellate briefs submitted by appellee(s) shall be mailed or delivered to the clerk of this court on or before May 6, 1980. A copy of the briefs shall be served on the appellant(s) pursuant to C.A.R. 25(c).

3. Four copies of appellant's reply brief, if any, shall be filed within five days after appellee's brief is filed. A copy of the brief shall be served on the appellee(s) pursuant to C.A.R. 25(c).

4. If either party elects to rely upon briefs filed with the trial court, those briefs may be supplemented with additional argument and legal authority prior to the time the briefs are filed with this court. However, regardless of whether a party elects to rely upon briefs filed with the trial court as supplemented, or, upon a new brief, neither appellant's opening brief nor appellee's answer brief shall exceed 20 pages in length without prior court approval. Appellant's reply brief shall not exceed 10 pages in length without prior court approval.

5. No preargument conference will be scheduled unless a written request therefor is made by either party on or before April 11, 1980.

6. The clerk of the district court, at the expense of appellant(s), shall prepare and file with this court on or before April 21, 1980, an abbreviated record on appeal. The clerk shall assign a number to each page of the record and prepare an index based thereon. It will not be necessary to folio the record on appeal. The record shall consist of:

(1) The final pleadings which framed the issues in the District Court;

(2) Findings of fact, conclusions of law and judgment;

(3) Motion for new trial and the District Court's ruling thereon;

(4) The transcript of the record and proceedings before the Career Service Board of the city and county of Denver, reviewed by the District Court;

(5) All documentary exhibits admitted in evidence except those exhibits of unusual bulk or weight;

(6) Such additional documents as the parties shall designate with the clerk of the District Court by April 11, 1980.

By the Court: DIVISIONI

Coyte, J.
Van Cise, J.
Kirshbaum, J.

Dated: April 4, 1980

Appendix F

COLORADO COURT OF APPEALS

No. 80CA0247

THEODORE B. MOORE,
Plaintiff-Appellant,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, et al.,
Defendants-Appellees.

ELECTION TO RELY UPON BRIEF FILED WITH DISTRICT COURT TOGETHER WITH SUPPLEMENTAL BRIEF

COMES NOW Theodore B. Moore, by and through his attorney, Bradley J. Yoder, and hereby elects to rely upon the "Brief of Plaintiff in Support of Action Under Colo. R. Civ. P. 106(a)" previously filed with the District Court and which is attached hereto, as supplemented by the additional abbreviated information set forth below:

SUPPLEMENTARY STATEMENT OF FACTS

Following the denial by the District Court for the City and County of Denver, the Honorable John Brooks, Jr., presiding, of plaintiff's Colo. R. Civ. P. 106(a) motion to reverse the findings of the Career Service Board, the District Court entered a final judgment on all claims in the matter.

SUPPLEMENTARY CITATION OF AUTHORITY

In *Rust v. Dolan*, 38 Colo. App. 529, 563 P.2d 28 (1977), reversed on other grounds, ____Colo.____, 576 P.2d 560 (1978), the Colorado Court of Appeals stated:

> Although it is a maxim of appellate law that reviewing courts will not substitute their judgment for that of the fact finder, when an administrative body's judgment is arbitrary or capricious that decision will be set aside. *See County Commissioners v. Simmons*, 177 Colo. 347, 494 P.2d 85 (1972).

30 Colo. App. at 531.

CONCLUSION

The plaintiff respectfully requests that the judgment of the District Court affirming the rulings of the Career Service Board be reversed, and the cause remanded to the District Court for further proceedings consistent with such reversal.

Respectfully Submitted,

/s/ _____

Bradley J. Yoder (#8549)
Attorney for Plaintiff-Appellant
P.O. Box 207, 317 Third St.
Castle Rock, CO 80104
688-4815

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Civil Action No. 79CV0564, Ctrm. 8

THEODORE B. MOORE,

Plaintiff,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, et al.,

Defendants.

BRIEF OF PLAINTIFF IN SUPPORT OF ACTION UNDER COLO. R. CIV. P. 106(a)

COMES NOW the plaintiff, Theodore B. Moore, by and through his attorney, Bradley J. Yoder, and respectfully submits the following Brief in support of plaintiff's action under Colo. R. Civ. P. 106(a).

The plaintiff in this action, Theodore Moore, has been employed for the past 12 years as a health sanitarian by the Department of Health and Hospitals of the City and County of Denver (Transcript Vol. 2, p. 2-3). His specific duties in 1976 were to inspect housing within the city and ensure compliance with the city's housing code and regulations (Vol. 2, p. 2-4). From 1969 through August, 1976, he was never disciplined for any reason and continuously received merit pay increases (Vol. 2, pp. 2-7, 2-8).

In August of 1976, Moore was assigned the task of inspecting a residence located at 503 S. Stuart Street (Vol. 2, p. 2-9). After inspecting the property, Moore prepared a notice listing code violations and submitted the notice to the defendant Charles Brown for approval

(Vol. 2, pp. 2-10, 2-11; City's Exhibit 3, Vol. 1, p. 1-17). Moore ordinarily submitted such notices to his usual supervisor, F. Sam MacDonald, but as MacDonald was on vacation, the notice was submitted to Brown instead (Vol. 2, pp. 2-10, 2-11). Brown made extensive revisions in the notice and indicated Moore should sign the revised notice. Moore declined to do so, as the revised notice was not in accordance with the Code or departmental regulations or practice, as hazardous conditions were being ignored in the revised notice, as the revised notice was illegal, and as plaintiff could not testify in court in support of the notice as his job ordinarily required him to do (Vol. 2, pp. 2-11 – 2-41).

When MacDonald returned from vacation later that month, Brown, MacDonald, and Joseph Pettit, the chief of the Housing Section, confronted Moore in Pettit's small office (Vol. 2, p. 2-38). MacDonald, with the approval of Brown and Pettit, ordered Moore to sign the notice, and he again declined (Vol. 2, pp. 2-39 – 2-40). At this point, neither MacDonald nor Pettit had actually inspected the property (Vol. 1, p. 1-86; Vol. 4, p. 4-26).

On September 10, 1976, Moore received a letter from J. Douglas McCluskie, director of the Environmental Health Service, requiring Moore to sign the revised notice or face disciplinary action (Vol. 2, p. 2-43, Appellant's Exhibit EE). Plaintiff again declined, and he was suspended for one week without pay from September 20 through September 24, 1976 (Appellant's Exhibit FF, Vol. 2, p. 2-44). Although several other reasons were offered by McCluskie to support the suspension, he admitted in his testimony that if Moore had signed the revised notice, there would have been no suspension (Vol. 1, p. 1-134).

Immediately after the suspension, plaintiff was also denied a proficiency pay increase largely on the basis of an Employee Performance Report prepared by Brown (Appellant's Exhibit A, Vol. 1, pp. 1-30 – 1-31; Vol. 2, pp. 2-59 – 2-60). EPRs were usually prepared by an employee's immediate supervisor (Vol. 1, p. 1-27; Vol. 2, 2-65).

During extensive hearings before the Career Service Board from May to November, 1978, plaintiff presented substantial and unrebutted evidence supporting his refusal to sign the revised notice. Brown had revised the notice to eliminate any reference to cut floor joists in the crawlspace of the residence. Plaintiff testified and introduced substantial photographic evidence indicating that one joist had been over halfway cut, and that another joint had been completely cut through (Appellant's Exhibits O, P, S, Vol, 2, pp. 2-22 – 2-24, 2-26). Although MacDonald at one point in his testimony denies any problem with the joists, he later admits there was (Vol. 1, pp. 1-73, 1-96). MacDonald did not deny that the photographs accurately depicted the conditions. Raymond Stewart, a structural engineer, corroborated the accuracy of the photographs, and indicated the floor would likely not support a heavy load (Vol. 4, pp. 4-6 – 4-7). One cut joist was located beneath the kitchen, and Stewart expressed doubt that the floor would support a filled freezer for any length of time (Vol. 4, P. 4-7). No expert witnesses testified in rebuttal of Stewart's testimony. In response to a question from the chairman of the board, Stewart indicated a complete failure of the floor system could result (Vol. 4, p. 4-22).

Plaintiff also presented undisputed documentary evidence that the citing of cut floor joists had previously been the department's practice (Appelant's Exhibit F, Vol. 1, p. 1-91). Article 631.7-2 of the City's

Code required that "every floor, interior wall, and ceiling shall be kept in sound condition and good repair" (Appellant's Exhibit DD, Vol. 2, p. 2-27, p. 3 of Exhibit).

Brown's revised notice also eliminated any reference to a hot water heater located within a pit in the crawlspace. The department's regulations provided that "gas-fired water heaters shall not be installed *in pits or other places subject to flooding by water seepage*" (Appellant's Exhibit B, Vol. 1, pp. 1-33, 1-37) (emphasis supplied). The testimony of Moore and Ray Stewart, and the photographic evidence clearly showed a high dirt wall around the heater with the controls in a pit eleven inches deep. Water stains were also evident around the heater, indicating the controls had been subject to flooding (Vol. 2, pp. 2-12 – 2-20, Appellant's Exhibits U, V, W, X, and Y; Vol. 4, pp. 4-6, 4-9). There was no evidence presented disputing this testimony or what the photographs revealed. There was no denial by any witnesses as to the accuracy of the photographs. At one point in the hearing in August, the city's attorney indicated he intended to have MacDonald look at the premises again (Vol. 2, p. 2-17, 2-18). MacDonald did not dispute the photographs in any respect even though he was later called by the city for rebuttal testimony (Vol. 5, pp. 5-10 – 5-18).

Brown also revised Moore's notice to indicate the foundation should be merely weatherproof, and not ratproof. Article 631.7-1 of the City's Code provided "every foundation . . . shall be substantially weathertight, watertight, and rodentproof . . ." (Appellant's Exhibit DD, p. 3 of Exhibit). The photographs disclose that D-Con rat poison packets were scattered about the crawlspace, indicating there had been a problem with rats.

The revised notice also omitted any reference to an absence of a main electrical disconnect on the premises. The evidence disclosed that MacDonald had previously approved citing the absence of a disconnect, and MacDonald admitted this (Appellant's Exhibits C and D, Vol. 1, pp. 1-87 – 1-90).

Any one of these revisions made by Brown would have justified Moore in refusing to sign the revised notice. McCluskie's immediate supervisor, Dr. John Sbarbaro, acknowledged that an employee should not be required to sign a document which is not supported in fact (Vol. 4, pp. 4-37, 4-49). The evidence was undisputed that Brown's notice was in conflict with the facts in several respects.

The city attempted to justify the suspension on other grounds. However, McCluskie admitted in his letter to Moore dated September 8, 1976 that the notice was the only reason for the suspension. The letter ordered Moore to sign the notice, and concluded "failure to comply with this order will lead to disciplinary action by this office." (Appellant's Exhibit EE, Vol. 2, p. 2-43). McCluskie also admitted in his testimony that if Moore had signed the notice, there would not have been a suspension (Vol. 1, p. 1-134).

The paucity of evidence to support the suspension is demonstrated by the conclusory finding of the Board in its Findings and Order (Complaint Exhibit A): "The Board finds, based upon the most credible evidence presented and the exhibits, that the five-day suspension was proper under the circumstances. The actions of the appellant which caused the suspension were of such a nature that the suspension was warranted." The Board did not give any indication as to what the "most credible" evidence consisted of, or what the actions of Moore were that warranted the suspension.

In *Lassner v. Civil Service Commission*, 177 Colo. 257, 493 P.2d 1087 (1972), the appellant Lassner's dismissal as chief psychologist from the Colorado State Hospital was affirmed by the Civil Service Commission and the District Court. In reversing the dismissal, the Colorado Supreme Court stated that agency action should be set aside if the action is unsupported by substantial evidence when the record is considered as a whole. 177 Colo. at 259. The Court also stated:

> [I]f there is only *some evidence* in *some particulars*, it is insufficient to justify affirmance of the discharge of a civil service employee. *** After a thorough review [of the record], we are convinced that appellant's dismissal cannot stand. Without detailing the testimony, it is obvious that the evidence on the specific charges was technical and trivial and is not supportive of substantial cause on the whole record. On the other hand the record reveals a personality conflict existed between appellant on one side, and his superior and a few co-workers of equal status on the other. ***

177 Colo. at 260 (emphasis in original).

The net result of the Board's findings on the suspension was to ignore the uncontroverted testimony and exhibits concerning the conditions at 503 S. Stuart Street. A public employee who was doing his job in a proper manner was being strongarmed into signing a notice in which he did not believe and which was not supported in fact. For his concern for the public safety and in adhering to the truth, the plaintiff was rewarded with a one-week suspension without pay. The Board's finding on the suspension cannot be allowed to stand.

The suspension was not the only penalty Moore suffered as a result of his refusal to sign the notice. On September 28, following his return to work on September 27 after the suspension, plaintiff was forcibly bumped out of a doorway by MacDonald, who stated, "You had better watch it, Mr. Moore" (Vol. 2, p. 2-63). The timing of the incident can only mean a continuation of the harassment Moore had been receiving for his refusal to sign the revised notice.

At approximately the same time, Moore also received a denial of his proficiency pay increase largely due to an Employee Performance Report prepared by Brown, who was not even Moore's usual supervisor (Appellant's Exhibit A). In light of the timing of the EPR and who prepared it, the denial can also only be seen as retaliation for plaintiff's refusal to sign the notice. The Board chose not to review the pay increase denial, despite the fact that Rule 2-20(d) of the City's personnel rules provides that the functions of the Career Service Board are to hear and adjudicate appeals from employees.

Furthermore, the denial of the pay increase was presented to Dr. Sbarbaro as a grievance, as acknowledged by Dr. Sbarbaro's letter dated October 28, 1976 (Appellant's Exhibit LL, Vol. 2, p. 2-73). Section 11-30 of the personnel rules provides that the "head of the agency shall consider the grievance and shall notify the employee of his decision within seven calendar days of the receipt of the grievance." Dr. Sbarbaro testified that he never ruled on the matters presented to him by Moore (Vol. 4, 4-59). The grievance was presented to Dr. Sbarbaro by the plaintiff in a letter dated October 7, 1976 (Appellant's Exhibit JJ, Vol. 2, pp. 2-68, 2-70). Since Dr. Sbarbaro did not rule on the grievance within seven days, it was arbitrary for the

Board not to consider the pay increase denial. The failure of Dr. Sbarbaro as head of the agency to rule in a timely fashion on the denial of the increase should have resulted in the increase being granted by the Board.

In July of 1977, Moore was again strongly berated by MacDonald for Moore's failure to cite the alleged absence of electrical service at the residence at 2832 Elm Street, and for failing to cite the presence of junk cars at the residence. The evidence established that MacDonald never entered the residence to see if the electricity was actually turned on, but merely noted that there was no meter (Vol. 5, pp. 5-16, 5-17). Moore's unrebutted testimony indicated that the meter had been by-passed and the house was still receiving electrical power (Vol. 3, pp. 3-8 – 3-10).

MacDonald also claimed that Moore had failed to cite the presence of junk cars on the premises. MacDonald admitted on cross-examination that cars with motors in them did not meet the criteria for junk cars, and also that he had not checked the cars to see if there were motors (Vol. 5, pp. 5-17, 5-18). Moore's undisputed testimony was that the cars did have motors in them (Vol. 3, pp. 3-10, 3-11).

Moore filed a grievance concerning MacDonald's actions, and the grievance was presented to Dr. Sbarbaro on August 1, 1977 (Appellant's Exhibit II, Vol. 3, p. 3-13). Moore testified that he called Dr. Sbarbaro's office on August 8, 9, and 10, but was told that Dr. Sbarbaro's response was not ready yet (Vol. 3-13, 3-14). Dr. Sbarbaro speculated that the response was mailed by his secretary on August 8, but did not know whether the response was mailed or picked up by Moore personally (Vol. 4, pp. 4-44, 4-45). Moore's testimony was

unrebutted that he picked up the response on August 11, and that the response was not ready prior to that time (Vol. 3, p. 3-13).

Under these circumstances and the evidence presented, Dr. Sbarbaro did not respond to the 2832 Elm Street grievance within the seven days allowed under the personnel rules, and the grievance should have been considered meritorious.

CONCLUSION

The Career Service Board's conclusions regarding the suspension of the plaintiff, the denial of his proficiency pay increase, the bumping incident, and the denial of his grievance concerning 2832 Elm Street, are unsupported by the record in this matter.

The plaintiff respectfully requests that this Court reverse the Findings and Order of the Board, order a purging of plaintiff's personnel records regarding his suspension and denial of pay increase, and enter a finding that plaintiff's grievances are meritorious.

Respectfully submitted,

/s/ _____

Bradley J. Yoder (#8549)
Attorney for Plaintiff
P.O. Box 207, 317 Third St.
Castle Rock, CO 80104
688-4815

Appendix G

COLORADO COURT OF APPEALS
STATE OF COLORADO

No. 80CA0247

THEODORE B. MOORE,
Plaintiff-Appellant,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, et al.,
Defendants-Appellees.

Appeal from dismissal after trial to the District Court

for the City and County of Denver.

2d Judicial District of Colorado

No. 79CV0564

HONORABLE JOHN BROOKS, JR.

ANSWER BRIEF FOR APPELLEES

MAX P. ZALL, #2367
City Attorney

GEOFFREY S. WASSON #6103
Assistant City Attorney

Attorneys for Defendants-Appellees
1445 Cleveland Place, Room 303
Denver, Colorado 80202
Telephone: (303) 575-2931

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTRODUCTION A-37
STATEMENT OF ISSUES A-37
STATEMENT OF THE CASE A-37
STATEMENT OF FACTS A-38
SUMMARY OF ARGUMENTS A-39

ARGUMENT

I. THE SCOPE OF JUDICIAL REVIEW IN A C.R.C.P. RULE 106(a) (4) ACTION IS LIMITED TO THE DETERMINATION OF WHETHER THERE IS ANY COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS AND ORDER OF THE BOARD A-39

II. THERE IS COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS AND ORDER OF THE BOARD A-41

III. THE BOARD PROPERLY DENIED MOORE'S GRIEVANCE ON THE DENIAL ON THE PROFICIENCY PAY INCREASE A-56

CONCLUSION A-59

TABLE OF AUTHORITIES

CASES Page

Board of County Commissioners v. Simmons, 177 Colo. 347, 494 P.2d 85 (1972) A-40

Chroma Corporation v. County of Adams, 36 Colo.App. 345, 543 P.2d 83 (1975) A-40

Cooper v. Civil Service Commission, 8 Colo.Lawyer 2440, 2442 (10-11-79) A-40

Cooper v. Civil Service Commission, ____Colo. App.____, 604 P.2d 1186, 1189 (1979) A-41

Lassner v. Civil Service Commission, 177 Colo. 257, 493 P.2d 1087 (1972) A-39

Rockford Newspapers, Inc., 63 LA 251, 253 (1974) A-44

Rust v. Dolan, 38 Colo.App. 529, 563 P.2d 560 (1978) A-40

State Civil Service Commission v. Hazlett, 119 Colo. 173, 201 P.2d 616 (1948) A-41

Traveler's Insurance Indemnity Co. v. Barnes, 191 Colo. 278, 552 P.2d 300 (1976) A-59

C.R.C.P.

Rule 106(a) (4) A-39, A-41

C.R.S. - 1973

§24-4-101 *et seq*. A-40
§24-4-106 ..... A-40
§24-4-107 ..... A-40

CAREER SERVICE AUTHORITY - Personnel Rules
Rule 7-46 ..... A-56
Rule 10-72(a) (3) A-42
Rule 10-72(a) (8) A-43
Rule 10-72(a) (9) A-43
Rule 10-72(a) (13) A-43
Rule 10-72(a) (14) A-43
Rule 11-30 ..... A-57

HOUSING CODE
Regulation 4, subparagraph R. A-48
Paragraph 7-2 ..... A-49

COLORADO COURT OF APPEALS
STATE OF COLORADO

No. 80CA0247

THEODORE B. MOORE,
Plaintiff-Appellant,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, consisting of Leo Cardenas, Francis H. Salter, and Alfred Wood; CHARLES BROWN; F. SAM MACDONALD; JOSEPH PETTIT; J. DOUGLAS McCLUSKIE; JOHN A. SBARBARO; and THE CITY AND COUNTY OF DENVER, a municipal corporation,

Defendants-Appellees.

ANSWER BRIEF FOR APPELLEES

INTRODUCTION

COME NOW the Defendants-Appellees and

respectfully submit this Answer Brief in response to Plaintiff-Appellant's Brief.

The Plaintiff-Appellant will be referred to as the Plaintiff or by his name, Moore. The Defendant Career Service Board will be referred to as the Board, the individually named Defendants will be referred to by their names. References to the Career Service Board Hearing Transcript are designated by Volume, Page(s), and Line(s), (CS Vol.____, p.____, l.____).

STATEMENT OF ISSUES

I

WHAT IS THE SCOPE OF REVIEW IN A C.R.C.P. RULE 106(a) (4) REVIEW OF THE CAREER SERVICE BOARD'S FINDINGS AND ORDER?

II

IS THERE COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS AND ORDER ENTERED BY THE BOARD?

III

DID THE BOARD ERR IN ITS TREATMENT OF THE GRIEVANCE MOORE PRESENTED ON THE DENIAL OF THE PROFICIENCY PAY INCREASE?

STATEMENT OF THE CASE

This is both an action seeking judicial review of the Board's Findings and Order under C.R.C.P. Rule 106(a) (4) and an action for damages allegedly resulting from tortious conduct on the part of the individually named Defendants. The Rule 106(a) (4) portion was briefed, argued, and a decision in favor of the

Defendants was entered by the trial court. Pursuant to Motion and Stipulation: that order was made a final judgment on all the Plaintiff's claims. The appeal was then filed.

STATEMENT OF FACTS

The hearing before the Board encompassed various appeals and grievances which had been submitted by Moore. Paragraph 1, of the Findings and Order (Appendix, p. 1), identified the five matters before the Board as follows:

1) Letter from Dr. McCluskie threatening disciplinary action dated September 8, 1976;

2) Five-day suspension from September 20, 1976 through September 24, 1976;

3) Bumping incident on September 28, 1976;

4) Denial of a proficiency pay increase to be effective October 1, 1976 due to below standard employee performance report;

5) Grievance regarding the inspection of 2832 Elm Street.

As set out in Argument I and II, *infra*, the key issue of this appeal is whether there is any competent evidence to support the findings of the Board. The "competent evidence in the record" in support of the Board's decision and the underlying facts will be further stated in the argument.

SUMMARY OF ARGUMENTS

I

THE SCOPE OF JUDICIAL REVIEW IN A C.R.C.P. RULE 106(a) (4) ACTION IS LIMITED TO THE DETERMINATION OF WHETHER THERE IS ANY COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS AND ORDER ENTERED BY THE BOARD

II

THERE IS COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS AND ORDER OF THE BOARD.

III

THE BOARD PROPERLY DENIED MOORE'S GRIEVANCE ON THE DENIAL OF THE PROFICIENCY PAY INCREASE.

ARGUMENT

I

THE SCOPE OF JUDICIAL REVIEW IN A C.R.C.P. RULE 106(a) (4) ACTION IS LIMITED TO THE DETERMINATION OF WHETHER THERE IS ANY COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS AND ORDER ENTERED BY THE BOARD.

Moore relies on *Lassner v. Civil Service Commission*, 177 Colo. 257, 493 P.2d 1087 (1972) for the proposition that the Board's Findings and Order (Appendix, p. 1&2) should be set aside if it is unsupported by substantial evidence when the record is considered as a whole. Such reliance is misplaced. *Lassner, supra,*

arose under the State Administrative Procedure Act, C.R.S. 1973, §24-4-101 *et seq.* C.R.S. 1973, §24-4-107 defines the applicability of the Act and states in pertinent part:

> "This article applies to every agency of the state having statewide territorial jurisdiction . . ."

In *Chroma Corporation v. County of Adams,* 36 Colo.App. 345, 543 P.2d 83 (1975) the Administrative Procedure Act was held not to apply to the Board of County Commissioners because it did not have statewide jurisdiction. The Career Service Board clearly has no statewide jurisdiction, nor is it an agency of the State. Moore can find no support in *Rust v. Dolan,* 38 Colo.App. 529, 563 P.2d 28 (1977). In *Rust v. Dolan,* ____Colo.____, 576 P.2d 560 (1978), the Colorado Supreme Court more completely stated the standard of review:

> "In order for a court to set aside a decision by an administrative agency on the grounds that it is arbitrary or capricious . . . *the court must find that there is no competent evidence supporting the agency's decision.* Board of County Commissioners v. Simmons, 177 Colo. 347, 494 P.2d 85 (1972) (emphasis added).

This Court in *Cooper v. Civil Service Commission,* 8 Colo.Lawyer 2440, 2442 (10-11-79) first stated the standard of review to be:

> "The standard of review of final administrative action is whether, on the basis of the whole record, the ultimate findings of the agency are supported by substantial evidence." Section 24-4-106, C.R.S. 1973.

In response to motion by the Civil Service Commission, *Cooper v. Civil Service Commission*, ____Colo.App. ____, 604 P.2d 1186, 1189 (1979) was modified to read:

> "The standard of review under Rule 106(a) (4) of final administrative action is whether, on the basis of the whole record, the ultimate findings of the agency are supported by any competent evidence."

The Colorado Supreme Court earlier defined the "any competent evidence test" in *State Civil Sevice Commission v. Hazlett*, 119 Colo. 173, 178, 201 P.2d 616, (1948), holding:

> The scope of review in certiorari proceedings, and the authority of courts to interfere with the findings of tribunals vested with exclusive jurisdiction to determine particular issues, have, by a long line of decisions, been judicially defined. We cannot consider herein whether the commission's findings are right or wrong, substitute our judgment for that of the commission's findings if there is any competent evidence to support the same.

This Honorable Court on review can only examine the record to determine if there is *any competent evidence* to support the Findings and Order entered by the Board.

II

THERE IS COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS AND ORDER OF THE BOARD.

In paragraph 5, of the Findings and Order (Appendix, p.2), the Board found the letter from McCluskie

(Ex. EE, Appendix, p.3) to be a proper order which put Moore on notice that if he did not comply with a lawful order of his supervisor he would receive disciplinary action. There is no dispute that Moore refused to sign the Notice (Ex.4, Appendix, p.4) referred to in Exhibit EE. There is no dispute that if Moore had signed the Notice he would not have been suspended. Moore erroneously argues that the refusal to sign the Notice became the sole reason for his suspension.

Moore was in fact suspended for multiple violations of the Personnel Rules based upon a number of separate incidents. Moore's supervisors, in an attempt to resolve the situation early on, would have let those other violations go by the wayside in exchange for his signing the Notice. The attempts to resolve the matter in that fashion cannot be held to immunize Moore for his conduct which violated the Personnel Rules.

The suspension was imposed for the violation of the Personnel Rules cited in the suspension letter dated September 15, 1976 (Ex.FF, Appendix, p.5&6). The factual basis for the violations were outlined in the suspension letter and a letter dated September 7, 1976, which was addressed from McDonald to McCluskie and in which letter McDonald requested that disciplinary action be initiated; this September 7, 1976 letter (Appendix, PP.7&8) written by McDonald was attached to and became a part of the suspension letter. Moore was charged with the violation of the following Career Service Authority Personnel Rules:

> **Rule 10-72(a) (3)** - In positions requiring initiative and independent judgment, inability to perform except under excessive supervision;

Rule 10-72(a) (8) - Habitual failure to maintain a satisfactory working relationship with other employees or the public;

Rule 10-72(a) (9) - Failure to observe departmental regulations;

Rule 10-72(a) (13) - Insubordination; refusal or habitual failure to comply with the proper orders of an authorized supervisor; refusal to do assigned work which he is capable of doing;

Rule 10-72(a) (14) - Acts or conduct detrimental to the good of the service;

The factual foundations for the alleged rule violations may be summarized as follows:

1. Failure of Moore to sign the Inspection Notice for the property located at 2520 Gaylord Street;

2. Moore's failure to inform the courtroom monitor of the status of an inspection for property located at 2520 Gaylord St.;

3. Moore's comments to McDonald that the present system of handling court cases was "bull shit";

4. Moore's abatement of a complaint for property located at 2526 Gaylord Street when the property had not been brought into compliance;

5. Moore's refusal to allow McDonald to inspect the odometer of the privately owned vehicle Moore used in performing his duties and for which he received renumeration from the City and County of Denver.

There is no dispute that Moore refused to sign the Notice. Moore's rationale for refusing to sign was

"because it was a falsification of what I knew to be the facts of what existed at the property" (CS Vol.2, p.41, 11.13-14) and he could not testify in court in support of the Notice as revised. (CS Vol.2, p. 41, 11.9-11). Moore argues that the revised Notice was therefore "illegal" (p.2, Plaintiff's Brief).

This "defense" to the admitted insubordination has no legal or factual basis. Moore's rights are those granted to him by the personnel rules enacted by the Board as mandated by the Charter of the City and County of Denver. The personnel rules simply do not allow an employee to refuse to comply with the proper orders of an authorized supervisor without being subject to the possible imposition of discipline. The personnel rules do not grant Moore the right to refuse to sign the Notice because he felt that to do so would have violated his professional integrity as a Public Health Sanitarian II.

While the personnel rules do not give the employee the right to refuse an order of a supervisor, the Rules do provide an avenue of relief for an employee. Rule 11-30 outlines the procedure for the presentation of grievances. The proper course for Moore to have taken would have been to comply with the order and file a grievance.

It is an axiom of labor relations that an employee works first and grieves second. An employee is not allowed to resort to self-help but rather must follow the grievance procedures established. This principle was expressed by the Arbitrator in *Rockford Newspapers, Inc.*, 63 LA 251, 253 (1974), when he stated:

> Some men apparently think that when a violation of contract seems clear, the employee may refuse to obey and thus resort

to self-help rather than the grievance procedure. That is an erroneous point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. Neither party can be the final judge as to whether the Contract has been violated. The determination of that issue rests in collective negotiation through the grievance procedure. But in the second place, and more important, the grievance procedure is prescribed in the Contract precisely because the parties anticipated that there would be claims of violations which would require adjustment. The procedure is prescribed for all grievances, not merely for doubtful ones. Nothing in the contract even suggests the idea that only doubtful violations need be processed through the grievance procedure and that clear violations can be resisted through individual self-help. The only difference between a "clear" violation and a "doubtful" one is that the former makes a clear grievance and the latter a doubtful one. But both must be handled in the regular prescribed manner.

Some men apparently think also that the problems here involved are evils incident to private profit enterprise. That, too, is a totally mistaken view, as a moment's reflection will show. The problems of adjustment with which we are concerned under the Contract are problems which arise and require adjustment in the management of an enterprise under any form of economic or social organization.

But an industrial plant is not a debating

> society. Its object is production. When a controversy arises production cannot wait for exhaustion of the grievance procedure. While the procedure is being pursued, production must go on. And some one must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in Supervision. It must be vested there because the responsibility must be accompanied by authority.

The principles articulated in *Rockford* are equally applicable here for the personnel rules supplant a collective bargaining contract. The work place of the Housing Section is no more suited to a "debating society" procedure than is a newspaper.

Moore's defense has no factual basis. The notice is not factually incorrect nor is it in any sense illegal. The notice as it was first formulated was submitted by Moore to Brown, the acting supervisor for Moore. Exhibits 2 and 3 (Appendix, p. 9, 10, 11) are Moore's handwritten write-ups of his inspection. Exhibit 4 (Appendix, p. 4) is the revised notice as prepared by Brown after his inspection of the property (CS Vol.1, p.13, of Brown's testimony of his inspection). A comparison of the three Exhibits (2, 3, and 4) shows the following modifications to Moore's write-up:

Brown deleted the following requirements:

1. Eliminate the unimproved pit that the gas water heater is located in.

2. Provide an approved main breaker disconnect for the electrical service.

3. Repair the foundation walls and floor joisits.

Brown made the following alterations in wording:

1. Provide ~~effective~~ screens for openable doors and windows. (Brown deleted the word lined through.)

2. Provide a weatherproof and ratproof foundation for the entire structure. (Brown substituted the requirement that the owner "repair foundation to be reasonably watertight."

3. ~~Repair the sewer drains~~ and provide a vent for the sink. (Brown deleted the words lined through and inserted, "There is a makeshift sump pump and drain connect in the crawl space. Provide an approved vent for the kitchen sink.")

4. Provide a floor covering for the bathroom ~~which is non-absorbent and easily cleanable.~~ (Brown deleted the words lined through and stated the requirement to "Provide an approved floor covering for the bathroom.")

5. Replace the missing ~~raingutter~~ downspouts. (Brown deleted the word lined through.)

As a result of these changes, three areas of disagreement arose with regard to the notice for the premise located at 503 South Stuart Street. Moore insisted upon the inclusion of the allegation of a violation regarding the water heater being located in a pit; the allegation regarding the floor joists; and the requirement of the main breaker disconnect switch. The test of what is or is not required in the notice as a test of

legality is found by examination of the Housing Code (Ex.DD) and the Rules and Regulations (Ex.B) enacted under the provisions of the Housing Code. Regulation 4, subparagraph R, states:

> Gas fired water heaters shall not be installed in pits or other places subject to flooding by water seepage.

Brown testified with regard to the location of the water heater that:

> I found that, while the water heater is located off toward a corner, it wasn't in a pit, per se. It wasn't an immediate pit surrounding the particular water heater, in addition to which I found that there was a sump pump in the basement there which would preclude perhaps any water accumulating in and around the water heater, so I didn't feel that was necessary in the Notice, so I scratched it. (CS Vol.1, p.15, 11.4-10).

When asked whether the Ordinance or the Rules and Regulations defined pits or other places subject to flooding by water seepage, Brown's response was, "No" (CS Vol.1, p.50, 11.11-18). Moore disputed that testimony and maintained that the water heater was in a pit. Moore's expert, Mr. Raymond Stewart, a Registered Professional Engineeer, recommended that ". . . an adequate automatic pump in a proper sump pit could be installed to discharge any water that might be collected." (CS Vol.4, P.13, 11.7-8).

Moore, on cross-examination, indicated that the "water heater in a pit" problem could be solved by the complete excavation of the basement or the installation of a low-boy water heater installed on a concrete pad (CS Vol.3, p.26, 11.7-8). Moore was then asked:

Q So the Code prohibits the installation of an adequately wired and connected sump pump?

A There's no definite statute on it. There's no definite policy that we have on it. It's up to the interpretation of the supervisor.

Q So is it correct then that the Code does not prohibit the installation of a properly wired and connected water pump?

A I wish I could say — there's no policy. We don't have anything on it.

Q I'm asking you about the Code. Does the Code—

A Oh, it's not in the Code.
(CS Vol.3, p.26, 11.14-25).

Exhibit DD, Municipal Ordinance No. 631, The Housing Code, paragraph 7-2, states:

> Every floor, interior wall and ceiling shall be kept in sound condition and good repair.

The Code and the Rules and Regulations do not expressly prohibit the existence of a cut floor joist. The Code and the Rules and Regulations only require that the floors at 503 South Stuart Street to be in sound condition and good repair. Brown testified that:

> . . . while the floor joists weren't exactly in a new construction, they were not in this particular instance a hazard, in my opinion, or a threat to the occupants from a structural standpoint . . . the floors were solid and tight, and there was not any give that I could locate

> or anything that was sagging or constituted a nuisance to cause the owner to have to make that kind of repair.
> (CS Vol.1, p.16, 11.2-10).

McDonald also testified regarding the condition of the floors, he stated, "I didn't find any problem with the floor joists, there hadn't been any structural damage done." When asked how he arrived at that conclusion, he stated, "Well, we look at the floor joists and the floor and we walk across the floor." (CS Vol.1, p.73, 11.21-25; p.74, 1.1). McDonald further testified that he weighs 210 pounds and the floors did not creak when he walked across it (CS Vol.1, p.74, 11.4-7). He testified that he performed a test similar to that of McDonald, jumping up and down and that no sagging resulted (CS Vol.3, pp. 21 and 22).

Moore's approach to the floor joists and that the cuts were violations of the Code and the Rules and Regulations, per se. Toward that end, Moore introduced numerous pictures of the two cut floor joists. The Defendants admit that the pictures are reasonably accurate. The Defendants assert, however, that the pictures are not conclusive proof that the floors are not sound and tight as testified to by Brown and McDonald. Moore's expert, Mr. Stewart, testified that:

> When you cut a floor joist, you cut the entire strength out of it where it would not be designed or would not sustain a designed load according to Building Code, with having cut joists or the deterioration of joists. (CS Vol. 4, p.7, 11.9-12.)

On cross-examination, Stewart was asked, "Do you know if the City and County of Denver had structural requirements for old housing?" His response was, "I

don't know. I know the inspections we do, they have to more or less conform to existing Building Codes." (CS Vol.4, p.16, 11.23-25; Vol. 4, p.17, 1.1.) The Defendants submit that Mr. Stewart's examination was conducted with reference to existing Building Codes and there is nothing in the record to indicate that Building Codes for new housing are comparable to the requirements of the Housing Code in the Rules and Regulations enacted thereunder. In light of the conflicting testimony with regard to the condition of the floors and their soundness, the Defendants submit that there is ample competent evidence in the record for the Board to have found that portion of the Notice was factually correct and therefore not unlawful.

Examining the disagreement with respect to the citing of the absence of a main electrical disconnect switch, the Defendants submit that an examination of the Housing Code and the Rules and Regulations nowhere require such a switch. Brown testified to that effect when he stated: ". . . there's no section under either the Ordinance or Rules and Regulations that I am familiar with that requires a main disconnect switch." (CS Vol.1, p.14, 11.21-23.) Moore nowhere testified or introduced evidence to show that under the Ordinance and the Rules and Regulations that a main disconnect switch is a mandatory requirement. With respect to Exhibit C, Mcdonald testified that even though cited, the owner was not in fact required to provide the main disconnect switch (CS Vol.1, pp.106-107). Exhibit D dealth with the situation in which the main disconnect had been by-passed creating a situation where there was no current limitation whatsoever (CS Vol.1, pp.108-110). Exhibits C and D simply do not support Moore's argument that a main disconnect switch is a mandatory requirement under the Code and the Rules and Regulations.

Turning to the second stated reason for the suspension, the Plaintiff's failure to inform the courtroom's monitor of the status of an inspection for the property located at 2520 Gaylord Street, Brown testified that on August 20, 1976, he was the monitor of the cases on the docket in court for that day. He testified that on that date a case involving an inspection for the premises located at 2520 Gaylord Street was on the docket and the case ws continued over to the following Friday which would have been August 27, 1976 (CS Vol.1, pp.17&18). Brown further testified that he informed Moore of the status of the case and that; "It was reset for court on August 27" (CS Vol.1, p.19, 11.5-17). Brown testified that the sanitarian, Moore, was to go back to the premises and visually inspect the premises and tell the supervisor or monitor going down to court the status of the case (CS Vol.1, pp.19&20).

McDonald testified that on August 27, Moore:

> Announced that a case had been dismissed in court, and we didn't have a representative there. (CS Vol.1, p.64, 11.4&5).

When asked to quote the exact words used by Moore, Mcdonald testified:

> Well, he (Moore) said the court system we currently had was "bull shit", and I asked him why he had said that, and he said; Well, he had a case dismissed and there was nobody down there to represent the City. (CS Vol.1, p.64, 11.9-12).

Moore admits using this language (CS Vol.2, p.48, 11.20-23). Upon further inquiries by McDonald to Moore, Moore stated that the case was the address of

the property located at 2520 Gaylord Street. McDonald testified at the end of the day on August 27 that:

> When I found out that we' had a case dismissed without any representation and Mr. Moore didn't know whether the place had been cleaned up or not, whether it was ready for dismissal, I went by there on my way home to see what kind of problems we were involved with.
>
> In other words, if, because we weren't represented in court, they had dismissed the case and we still hadn't solved the problem, then it would have been my responsibility to see to it that another Notice was issued and continue with our corrective action.
> (CS Vol.1, p.66, 1.18-25; p.67, 11.1&2).

McDonald testified that as he made the follow-up inspection at 2520 Gaylord Street he also had an occasion to observe the property for the address at 2526 Gaylord Street for which a complaint was also outstanding. Referring to the complaint at 2526 Gaylord, McDonald stated; "I looked at that at the same time, and it hadn't been cleaned up. It was still a mess." (CS Vol.1, p.67, 11.15-17). McDonald testified that on August 30, 1976, Moore turned in the complaint for 2526 Gaylord Street showing that it had been abated, as reflected in Exhibit 5. McDonald testified that when he received the abated complaint he assumed that in the period over the weekend that the premises had been cleaned up. McDonald then went back to check it again on his way home. He testified that there was no change in the property on Monday evening to warrant the abatement of the complaint. McDonald stated that he then made arrangements with Moore to go out and look at the property with him (CS Vol.1, pp.68&69).

McDonald testified that he did not recall if Moore gave any explanation of why he had abated the complaint (CS Vol.1, p.70, 11.16&17).

Upon returning with Mr. Moore in Mr. Moore's vehicle from this joint inspection at 2526 Gaylord Street, McDonald noticed that the Plaintiff had his odometer covered up with a piece of paper, making a visual check of his mileage impossible. McDonald testified that later that day:

> I asked him if I could look at his mileage. I noticed he had it covered up, and he said, "Well, did you look at everybody else's mileage?" And I said, I want to look at yours, why do you have it covered up? Well, he said it was a little quirk he had, he didn't want to ride along seeing miles accumulate on his vehicle, so he covered it up. I thought that it was unusual that he wouldn't . . .
>
> Q Did you ask him again if you could look at his mileage that day?
>
> A I don't remember how many times I asked him. We discussed it briefly and that's when he explained that he had this quirk and did not want to watch the mileage accumulate on his car, and if I looked at everybody else's mileage, I could look at his.

Moore himself, on cross-examination, stated, "I don't refuse to show my odometer. I refuse to be singled out and be brow-beaten and knocked around like this." (CS Vol.3, pp.39&40, 11.25, 1&2). It is not in dispute that Moore was insubordinate and refused to allow McDonald to view the mileage at the time he asked.

The Plaintiff submitted three separate and distinct grievances outlined in the Statement of Facts. The first dealt with the alleged bumping incident which occurred on September 28, 1976. The Board found in paragraph 3, of the Findings and Order (Appendix, p.2.), that the situation was "Nothing more than a case of two people trying to go through a door at the same time with neither person paying attention. The Board finds neither party to be at fault."

On direct examination, Moore described the bumping incident as follows:

> Well, I was walking out the door, it was one of those wide doors, double door in fact, and he was walking in. He had just come back from Mr. McCluskie's office, it appeared, and I was going to the door and he was coming this way and the next thing I knew I was being knocked out of the doorway. It happened pretty fast. I reacted like there was going to be a confrontation and Mr. McDonald said you had better watch it Mr. Moore and he want and sat at his desk.
> (CS Vol.2, p.62, 11.1-10).

The Defendants submit that the Plaintiff simply never proved any intentional misconduct on the part of McDonald and that the evidence supports the Board's findings with regards to this grievance.

Examining the grievance concerning the inspection made at the property located at 2832 Elm Street, the Defendants again would assert that the Plaintiff failed to show any misconduct on the part of McDonald so as to warrant the Board's upholding Moore's grievance. McDonald testified; "On the morning of the 15th when he came to work, I asked him if there was

no electrical meter, that there was no electrical service on the property." (CS Vol.5, p.14, 11.11-13). When asked what Moore's response was, McDonald testified, "Well, he became upset and he told me that I should talk to his attorney." McDonald further testified that in essence, the conversation on the 15th was that he had told Moore that he had failed to cite the electrical violation. He further testified that no disciplinary action was taken with regard to his missing the call of the electrical violation.
(CS Vol.5, p.15).

III

THE BOARD PROPERLY DENIED MOORE'S GRIEVANCE ON THE DENIAL OF THE PROFICIENCY PAY INCREASE.

Personnel Rule 7-46 states in pertinent part:

> The action of the appointing authority in denying a proficiency pay increase may be appealed to the Career Service Board only on the basis of discrimination because of race, creed, color, national origin, or political opinion or affiliations. Furthermore, an employee who has been denied a proficiency pay increase may not request an investigation by the personnel director under Section 11-30 of the Personnel Rules except on the basis of discrimination because of race, color, creed, national origin, or political opinion or affiliation.

The clear meaning of the Rule quoted above is that the denial of a proficiency pay increase can only be appealed on the allegation of discrimination. Moore nowhere alleged or offered any evidence whatsoever that the denial of the proficiency pay increase was in

any way premised upon the prohibited grounds. Moore does not now point to any evidence of discrimination. Rather, Moore argues that the protest was presented as a grievance, under Personnel Rule 11-30, to Dr. Sbarbaro. Moore argues that Dr. Sbarbaro failed to respond, which is tantamount to a "default", and "judgment" is then to be entered in favor of Moore.

Moore's argument is fatally flawed in two respects. First, Rule 7-46, quoted above, requires that any grievance filed under Rule 11-30 be based upon the grounds of discrimination. Second, Moore advances an interpretation of Rule 11-30 that finds no support in the Rule. The Rule states:

> **Section 11-30 - Grievances of Employees**
>
> An employee who is aggrieved may present a grievance according to the following procedure:
>
> a) The grievance shall be presented in writing and shall be dated. It shall include the name and address of the grievant, the action which is the subject of the grievance, the date of the action, and a statement of the remedy sought.
>
> b) The employee shall present a grievance to the immediate supervisor within seven (7) calendar days after notification of the action which gives rise to the grievance. The supervisor shall consider the grievance and within seven (7) calendar days give the employee dated, written notice of a decision.
>
> c) If the response of the immediate supervisor does not resolve the grievance, and

the employee wishes to pursue it further, the employee shall present it to the head of the agency in writing within seven (7) calendar days after receiving the decision of the immediate supervisor.

If the immediate supervisor has not responded to the grievance within seven (7) calendar days and the employee desires to pursue it further, the employee must present it in writing to the head of the agency or a designated representative no later than seven (7) days after the supervisor's response was due.

The head of the agency, or a designated representative, shall consider the grievance and shall give the employee dated, written notice of a decision within seven (7) calendar days of the receipt of the grievance.

d) If the employee still feels aggrieved after receipt of this decision, or the agency head has not responded within seven (7) calendar days, and the grievance concerns an alleged violation of the Career Service Charter Amendment, Ordinances relating to the Career Service, or the Career Service Rules, and the employee wants to pursue it further, the employee shall appeal to the Hearings Officer of the Career Service Board in accordance with the provisions of Rule XII *Appeals*.

> A copy of the grievance and of the replies from the immediate supervisor and the agency head or his designated representative shall be attached to the appeal of the Hearings Officer.

The Rule simply does not provide for the type of default judgment argued by Moore.

The Defendants submit in the absence of an interpretation of Rule 7-46 that is clearly erroneous on its face, the Board's interpretation must be given great deference by this Honorable Court on review. *Travelers Insurance Indemnity Co. v. Barnes,* 191 Colo. 278, 552 P.2d 300 (1976).

CONCLUSION

The Defendants assert that there is ample competent evidence to support the Findings and Order of the Board. The trial court and this Honorable Court on review may not substitute its judgment for that of the Board on the question of the credibility of the witnesses, this Honorable Court cannot decide whether the Board's decision is right or wrong. This Honorable

Court's inquiry is limited to whether there is competent evidence in the record to support the decision of the Board. The Defendants assert that the Board's Findings and Order must be affirmed as a matter of law.

Respectfully submitted,

MAX P. ZALL #2367
City Attorney

GEOFFREY S. WASSON #6103
Assistant City Attorney

/s/ By _____
GEOFFREY S. WASSON

Attorneys for Defendants-
Appellees
1445 Cleveland Place, Room 303
Denver, Colorado 80202
Telephone: (303) 575-2931

Appendix H

COLORADO COURT OF APPEALS

No. 80CA0247

THEODORE B. MOORE,
Plaintiff-Appellant,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, et al.,
Defendants-Appellees.

PETITION FOR REHEARING

APPEAL FROM THE DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER, JUDGE JOHN BROOKS, JR.

OPINION OF THE COURT OF APPEALS BY JUDGE CHARLES D. PIERCE, JUDGE RALPH H. COYTE AND JUDGE EDWIN G. RULAND, CONCURRING.

Bradley J. Yoder (#8549)
Attorney for Plaintiff-Appellant
Theodore B. Moore
P.O. Box 207, 317 Third St.
Castle Rock, CO 80104
688-4815

COMES NOW the plaintiff-appellant, Theodore B. Moore, by and through his attorney, Bradley J. Yoder, and respectfully petitions the Court of Appeals for a rehearing on all matters concerning the appeal. As grounds for his motion, plaintiff-appellant shows the Court the following:

1. The standard of review in this matter should have been whether there was substantial evidence to support the Career Service Board's action, rather than the "any competent evidence" standard applied by the District Court and the Court of Appeals. There is no rational basis for a state employee to have his case reviewed under the substantial evidence standard, while a county or municipal employee to be saddled with the any competent evidence standard. Application of the lesser standard in this case to Moore denies him his rights of due process and equal protection.

2. The Court of Appeals opinion states: "Moore admits that the matters set forth in the order which he refused to sign were correct as far was they went." The notice which Moore was requested to sign included an addition by a supervisor of a citation to a makeshift sump pump (City's Exhibit 3, Vol. 1, p. 1-17) which was unnecessary in light of Moore's original notice which included removing the hot water heater from the pit.

3. The Court erred if finding that Moore should have signed the notice and then made the notice the subject of a grievance. First of all, Moore did file grievances relating to the 503 South Stuart Street notice and other matters (Vol. 2, pp. 2-58, 2-60, 2-61). In addition, the procedure suggested by the Court would entail submitting an additional notice of code violations to the homeowner months after the first notice is given. As indicated by Moore's supervisor, F. Sam MacDonald, "we are supposed to have a certain sensitivity to the people we are dealing with" (Vol. 1, p. 1-86, lines 8-9). It would appear to be unwise to have the public run the gauntlet of having to deal with several notices over a considerable period of time.

4. The Court of Appeal's finding that the denial of the proficiency pay increase is not reviewable ignores Rule 2-20(d) of the City's personnel rules, which provides that the function of the Career Service Board are to hear and adjudicate appeals from employees.

5. The Court's opinion does not address Moore's contention that the grievance concerning 2832 Elm Street was not ruled upon by Dr. Sbarbaro within seven days, as required by the personnel rules, and that the grievance should therefore have been allowed.

Respectfully submitted,

/s/ _____

Bradley J. Yoder (#8549)
Attorney for Plaintiff-Appellant
P.O. Box 207, 317 Third St.
Castle Rock, CO 80104
688-4815

Appendix I

COLORADO SUPREME COURT

No. 80 SC 304

THEODORE B. MOORE,

Petitioner,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, et al.,

Respondents.

PETITION FOR CERTIORARI FROM THE COLORADO COURT OF APPEALS

THE HONORABLE CHARLES D. PIERCE, RALPH H. COYTE, AND EDWIN G. RULAND, JUDGES OF THE COURT OF APPEALS

COURT OF APPEALS NO. 80CA0247

Bradley J. Yoder (#8459)
Attorney for Plaintiff-Appellant
Theodore B. Moore
P.O. Box 207, 317 Third Street
Castle Rock, CO 80104
688-4815

JURISDICTIONAL STATEMENT

Review is sought of the opinion dated September 4, 1980, in which the Court of Appeals affirmed the judgment of the District Court for the City and County of Denver, which judgment had affirmed the action of

the Career Service Board denying the petitioner Moore's appeal of a five-day suspension from employment and other grievances.

The petitioner's motion for rehearing was denied by the Court of Appeals on October 2, 1980.

QUESTIONS PRESENTED FOR REVIEW

1. Should the proper scope of review under C.R.C.P. 106(a) (4) of the Career Service Board's findings be whether there was any competent evidence to support the findings, or whether the findings are supported by substantial evidence?

2. Was the District Court correct in affirming the action of the Career Service Board suspending petitioner without pay for five days, despite substantial and unrebutted evidence that the suspension was unjustified?

3. Was the District Court correct in affirming the action of the Career Service Board denying petitioner's grievances relating to unjustified harassment from his supervisors?

STATEMENT OF THE CASE

Petitioner Theodore B. Moore has been employed for more than the past 12 years as a health sanitarian by the Department of Health and Hospitals of the City and County of Denver. His specific duties in 1976 were to inspect housing within the city and ensure compliance with the city's housing code and regulations.

In August, 1976, Moore inspected the residence at 503 S. Stuart Street, prepared a notice listing code violations, and submitted the list to the defendant

Charles Brown for approval. Brown made extensive revisions in the notice and indicated Moore should sign it. Moore declined to do so on the grounds the revised notice was not in accordance with the code or departmental regulations or previous practice, as hazardous conditions were being ignored in the notice, and because Moore could not honestly testify in court in support of the notice as his job ordinarily required him to do.

Later that month, the respondents F. Sam MacDonald, Joseph Pettit, and Brown, who were supervisors within the department, again ordered Moore to sign the notice, and he again declined. In September, Moore received a letter from J. Douglas McCluskie, director of the Environmental Health Service within the department, ordering Moore to sign the notice or face disciplinary action. He again declined and was suspended without pay from September 20 through 24. Immediately after the suspension, Moore was also denied a proficiency pay increase.

During extensive hearings before the Career Service Board from May to November, 1978, Moore presented substantial and unrebutted evidence supporting his refusal to sign the notice. Brown's revised notice eliminated any reference to cut floor joists in the crawlspace. Photographs were admitted, the accuracy of which was undisputed, showing one joist over halfway cut and another completely cut through. A structural engineer testified that the condition of the floor was such that it would not support a heavy load, such as a filled freezer, and that the cut joists were located under the kitchen floor. The city's code required that every floor be kept in sound condition and good repair.

The revised notice also eliminated references to several conditions which were prohibited by the code,

regulations, or previous practice, and which were present at the house, including a hot water heater within a pit, the foundation not being ratproof, and the absence of a main electrical disconnect.

Following his suspension, Moore was subject to several instances of harassment by supervisors, including being bumped out of a doorway by a supervisor, denial of a pay increase, and allegedly failing to cite violations on another inspection when the violations did not exist. Moore filed grievances after each of these incidents.

After the Career Service Board upheld the suspension and denial of grievances, Moore commenced a C.R.C.P. 106(a) (4) review in the District Court, and also sought damages against the defendants other than the Board. The District Court affirmed the Board in a minute order dated August 15, 1979.

ARGUMENT

I. THE PROPER STANDARD OF REVIEW OF THE BOARD'S ACTION ON APPEAL SHOULD BE WHETHER THE BOARD'S FINDINGS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE RATHER THAN BY ANY COMPETENT EVIDENCE.

The Court of Appeals, citing *Cooper v. Civil Service Commission*, ____Colo. App.____, 604 P.2d 1186 (1979), concluded that the proper standard of review of the Board's actions was whether the findings were supported by any competent evidence. The Court rejected petitioner's assertion that the standard ought to be that found in *Lassner v. Civil Service Commission*, 177 Colo. 257, 493 P.2d 1087 (1972), wherein the Court

stated that agency action should be set aside if the action is unsupported by substantial evidence when the record is considered as a whole. The *Lassner* case involved a state employee proceeding under the State Administrative Procedure Act, while *Cooper* involved a review under C.R.C.P. 106(a) (4).

There is no rational reason why a municipal employee such a Moore should be given only the "any competent evidence" review by the appellate courts of this state, while a state employee should be entitled to the "substantial evidence" standard. This Court has indicated that "the constitutional minimum under the Equal Protection Clause is that a distinction between ostensibly similar classes must be rationally related to a legitimate state objective." *Petrafeck v. Industrial Comm.*, 191 Colo. 566, 568, 554 P.2d 1097 (1976). There do not appear to be any real differences between the situation of a municipal and state employee.

If this Court should find that the substantial evidence standard ought to have applied in this case, petitioner Moore would ask that the Court review the record to determine if there is substantial evidence to support the Board's actions, or else remand the matter to the District Court for reconsideration of the case under the substantial evidence standard.

II. THE DISTRICT COURT ERRED IN AFFIRMING THE FIVE-DAY SUSPENSION OF PETITIONER, DESPITE THE SUBSTANTIAL AND UNREBUTTED EVIDENCE THAT THE SUSPENSION WAS UNJUSTIFIED.

Regardless of the standard of review to be applied, there is no substantial or competent evidence to support the findings of the Board. In *Rust v. Dolan*, 38

Colo. App. 529, 563 P.2d 28 (1977), reversed on other grounds, 195 Colo. 173, 576 P.2d 560 (1978), the Court of Appeals stated:

> Although it is a maxim of appellate law that reviewing courts will not substitute their judgment for that of the fact finder, when an administrative body's judgment is arbitrary or capricious that decision will be set aside. *See County Commissioners v. Simmons,* 177 Colo. 347, 494 P.2d 85 (1972).

38 Colo. App. at 531.

The key factor for Moore's five-day suspension was his refusal to sign the notice regarding the 503 S. Stuart Street residence. J. Douglas McCluskie, who was the person who actually suspended Moore, acknowledged in his testimony that if Moore had signed the revised notice, there would have been no suspension. McCluskie's immediate supervisor, Dr. John Sbarbaro, acknowledged that an employee should not be required to sign a document which is not supported in fact.

The net result of the Board's findings on the suspension was to ignore the uncontroverted testimony and exhibits concerning the conditions at the house. Moore was doing his job in a proper manner and refused to close his eyes to the conditions. For his concern for the public safety and in adhering to the truth, he was rewarded with a one-week suspension without pay.

The Court of Appeals stated that Moore should have pursued grievance procedures available to him rather than refusing to sign the notice. As indicated by the months and months it has taken for Moore's other grievances to be processed, this would have taken a

considerable period of time, and all the while the unsafe conditions would persist. There would also seem to be an aura of harassment in notifying a homeowner he must make certain corrections, and then several months later telling him to make further corrections to conditions which were there all the while. As indicated by Moore's immediate supervisor, F. Sam MacDonald, "we are supposed to have a certain sensitivity to the people we are dealing with."

The Court of Appeals also indicated that Moore admitted the matters set forth in the order were correct as far as they went. The notice which Moore was requested to sign included an additional citation to a makeshift sump pump, the correction of which was unnecessary in light of Moore's original notation to remove the hot water heater from the area subject to flooding.

III. THE DISTRICT COURT ERRED IN AFFIRMING THE ACTION OF THE BOARD DENYING PETITIONER'S GRIEVANCES RELATING TO UNJUSTIFIED HARASSMENT BY HIS SUPERVISORS.

The suspension was not the only penalty Moore suffered as a result of his refusal to sign the notice. On September 28, the day after his return to work from the suspension, Moore was forcibly bumped out of a doorway by his supervisor MacDonald, who stated, "you had better watch it, Mr. Moore." At approximately the same time, Moore also received a denial of his proficiency pay increase largely due to an Employee Performance Report prepared by Brown, who was not even Moore's usual supervisor.

The Career Service Board chose not to review the pay increase denial, despite the fact that Rule 2-20(d) of the City's personnel rules provides that the functions of the Board include hearing and adjudicating appeals from employees. The effect of the Board's ruling was to allow harassment of Moore for his stand without affording any avenue of relief.

Furthermore, the denial of the pay increase was presented to Dr. Sbarbaro as a grievance, as acknowledged in a letter from Dr. Sbarbaro dated October 28, 1976. Section 11-30 of the city's personnel rules requires the agency head, in this case Dr. Sbarbaro, to rule on employee grievances within seven days of receiving the grievance. Dr. Sbarbaro never ruled on the grievance, and it was arbitrary for the Board not to have granted the increase on these grounds alone.

In July of 1977, Moore was again strongly berated by MacDonald for not citing the presence of junk cars at a residence, and the absence of electricity.

The unrebutted testimony was that the cars did not meet the department's criteria for being junk cars and that the electricity in fact was turned on. Again Dr. Sbarbaro failed to respond to Moore's grievance within seven days. Due to the failure of the timely response, the Board should have considered the grievance meritorious.

CONCLUSION

There are special and important reasons why this matter should receive review by the Supreme Court, including the fact that the standard of review for municipal employees should be that of "substantial evidence", which is the standard accorded to state employees, and

that a public employee has been suspended from employment for simply doing his job thoroughly and with integrity.

/s/ _____

Bradley J. Yoder (#8549)
Attorney for Petitioner
P.O. Box 207, 317 Third St.
Castle Rock, CO 80104
688-4815

Appendix J

COLORADO SUPREME COURT

No. 80 SC 304

THEODORE B. MOORE,

Petitioner,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COME NOW the Respondents and respectfully submit their Brief in Opposition to Petition for Writ of Certiorari.

STATEMENT OF ISSUE

Did the Court of Appeals err in applying the "Any Competent Evidence Test" as the standard of judicial review in this action arising under Rule 106(a) (4) of the Colorado Rules of Civil Procedure?

SUMMARY OF ARGUMENT

THE SCOPE OF JUDICIAL REVIEW IN A C.R.C.P. RULE 106(a) (4) ACTION IS LIMITED TO THE DETERMINATION OF WHETHER THERE IS ANY COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS AND ORDER ENTERED BY THE CAREER SERVICE BOARD.

The Court of Appeals properly determined the scope of judicial review under C.R.C.P. Rule 106(a) (4) to be as stated in *Cooper v. Civil Service Commission*, ____Colo.App.____, 604 P.2d 1186, 1189 (1979):

> The standard of review under Rule 106(a) (4) of the final administrative action is whether, on the basis of the whole record, the ultimate findings of the agency are supported by any competent evidence.

This standard of judicial review is in accord with numerous prior holdings of this Honorable Court, *Civil Service Commission v. Hoag*, 88 Colo. 169, 293 P. 338 (1930); *State Civil Service Commission v. Hazlett*, 119 Colo. 173, 201 P.2d 616 (1948).

Petitioner, in his Petition for Rehearing filed with the Court of Appeals, raised for the first time his equal protection argument found at page 4 of the Petition for Certiorari. This was never raised as an issue in the District Court (trial court) nor in the briefs filed in the Court of Appeals. Petitioner's failure to raise the equal protection argument as an issue in the proceedings below in a timely manner stands as a barrier to it being raised before this Honorable Court under *Hessling v. Broomfield*, 193 Colo. 124, 563 P.2d 12 (1977) and *People v. Wheatridge Poker Club*, 194 Colo. 15, 569 P.2d 324 (1977).

This Petition for Writ of Certiorari should be denied under the guidelines of Colorado Appellate Rule 49 for the following reasons:

1. Neither the District Court nor the Court of Appeals has decided a question of substance not heretofore determined by the Supreme Court;

2. A question of substance has not been decided in a way which is probably not in accord with the applicable decisions of the Supreme Court;

3. The decision of the Court of Appeals does not create a conflict with another decision of said court;

4. The Court of Appeals has not departed nor sanctioned a departure from the acceptable and usual course of judicial proceedings so as to call for the exercise of the Supreme Court's power of supervision.

The bulk of the Petition for Writ of Certiorari merely goes to the merits of a judicial review which would determine if the evidence below would support the Findings and Order of the Career Service Board. The Court of Appeals found that the "incidents (upon which the suspension was based) were hotly disputed in the evidence, but the Board's resolution of these factual matters is binding upon us." The Respondents will at this juncture forego a detailed analysis of the record below which would show competent evidence in the record to support the Board's Findings and Order. Such argument is best reserved if an additional review of the record is required.

The Petitioner has not articluated a single legitimate reason why certiorari should be granted under the guidelines of C.A.R. Rule 49. In the absence of such a showing, the Petition should be denied. Both the District Court and the Court of Appeals reviewed the record below and found that upon conflicting and "hotly disputed evidence" the decision of the Career

Service Board should be sustained. No good purpose would be served by granting this Petition for Certiorari.

The Respondents respectfully request that this Petition be denied.

Respectfully submitted,

MAX P. ZALL
City Attorney

GEOFFREY S. WASSON
Assistant City Attorney

By: /s/
GEOFFREY S. WASSON

Attorneys for Respondents
1445 Cleveland Place, Room 303
Denver, Colorado 80202
Telephone: (303) 575-2931